BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TERRY C. STEVENS,

Claimant,

vs.

NORFOLK IRON & METAL,

Employer,

and

ZURICH AMERICAN INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 5059598

ALTERNATE MEDICAL

CARE DECISION

HEAD NOTE NO: 2701

This is a contested case proceeding under Iowa Code chapters 85 and 17A. The expedited procedures of rule 876 IAC 4.48, the "alternate medical care" rule, are invoked by claimant, Terry Stevens.

This alternate medical care claim came on for hearing on January 10, 2019. The proceedings were recorded digitally and constitute the official record of the hearing. By an order filed by the workers' compensation commissioner, this decision is designated final agency action. Any appeal would be a petition for judicial review under Iowa Code section 17A.19.

The record in this case consists of Claimant's Exhibits 1-8, Defendants' Exhibits A-D, and the testimony of claimant.

Before the taking of testimony, defendants moved for a continuance to further investigate the recommendations of authorized treating physicians. The motion was denied on the record.

ISSUE

The issue presented for resolution in this case is whether claimant is entitled to alternate medical care consisting of arthroscopic surgery to the right shoulder

FINDINGS OF FACT

Defendants accept liability for an injury occurring to claimant on June 7, 2017.

On August 3, 2017 claimant was evaluated by Abdullah Foad, M.D. Dr. Foad is an authorized treating physician. Claimant had right shoulder and neck pain from pulling chains at work. Claimant was assessed as having right shoulder and neck pain more consistent with a cervical problem. Dr. Foad did not believe claimant's pain generator was in his right shoulder. Claimant was referred to Michael Dolphin, D.O., an orthopedist specializing in the spine, for an evaluation of the cervical spine. He did not believe further care of the right shoulder was required until the cervical spine was addressed. (Exhibit A)

Claimant returned to Dr. Foad on August 23, 2018. Claimant had been evaluated by Dr. Dolphin. Dr. Dolphin did not believe claimant required cervical surgery. Claimant was given a diagnostic and therapeutic cortisone injection in the shoulder. Claimant was to return for reevaluation. (Ex. B)

On September 13, 2018, claimant was evaluated by Dr. Foad. Dr. Foad requested authorization from defendant insurer to perform a diagnostic arthroscopic surgery to claimant's right shoulder. (Ex.t 1)

On the same day Dr. Foad scheduled claimant's surgery for October 22, 2018, subject to approval by defendant insurer. (Ex. 2)

On September 13, 2018, claimant was also evaluated by Camilla Frederick, M.D. Dr. Frederick is also an authorized treating physician. Claimant had right shoulder pain. A cortisone injection by Dr. Foad had helped with symptoms and claimant was fifty percent better for a week-and-a-half after the injection. Claimant denied working at another job. Following her exam, Dr. Frederick agreed with Dr. Foad that claimant required a diagnostic arthroscopic surgery to the right shoulder. (Ex. 3)

On or about October 16, 2018 claimant's surgery was cancelled, as defendant insurer had not authorized the surgery. (Ex. 4)

On October 16, 2018, claimant's counsel wrote defendants' counsel requesting that surgery for claimant be authorized. (Ex. 7)

Exhibit D are screen shots from a Facebook page for a company called Steven's Auto. Some of the texts and photos in Exhibit D appear to come from customers thanking "Terry" for getting work done quickly and cheaply on their vehicles. Claimant testified Steven's Auto is owned by his wife. Claimant says he does not do physical work at Steven's Auto and only communicates with and greets customers. Claimant said he has changed tires on his own vehicle.

Claimant testified he wants to have the surgery recommended by Dr. Foad and Dr. Frederick. Claimant said he has received no communication from defendants why the surgery, scheduled for October 22, 2018, has not yet been authorized.

CONCLUSION OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6)(e).

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. P. 14(f)(5); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983). In Pirelli-Armstrong Tire Co., 562 N.W.2d at 433, the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

> [T]he words "reasonable" and "adequate" appear to describe the same standard.
>
> [The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services only if that standard is met. We construe the terms "reasonable" and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

An employer's right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988).

Reasonable care includes care necessary to diagnose the condition, and defendants are not entitled to interfere with the medical judgment of their own treating physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening Decision June 17, 1986).

Claimant was evaluated by Dr. Foad in August of 2017. At that time Dr. Foad did not believe claimant was a candidate for shoulder surgery until claimant was evaluated by a cervical surgeon. (Ex. A) A spine surgeon did not believe claimant required cervical surgery. (Ex. B) Claimant was given a cortisone injection by Dr. Foad. Based, in part, on claimant's response to the injection, the opinion of Dr. Dolphin, and his reevaluation of claimant in September of 2018, Dr. Foad recommended arthroscopic surgery to the right shoulder. Dr. Frederick agreed with that recommendation. (Exs. 1-3)

Defendants have not authorized that surgery. Defendants have not communicated to claimant why surgery, recommended by two authorized treating physicians, has not been authorized. Defendants have had since September of 2018 to investigate the recommendations made by Dr. Foad and Dr. Frederick. There is nothing in the record suggesting any investigation was performed. Based on defense counsel's questioning at hearing, it would appear the delay may be due to claimant allegedly working at Steven's Auto. However, as noted above, defendants accept liability for the alleged work injury.

Given this record, claimant has carried his burden of proof he is entitled to the surgery recommended by both Dr. Foad and Dr. Frederick.

THEREFORE IT IS ORDERED:

The claimant's petition for alternate medical care is granted. Defendants are ordered to provide claimant the surgery recommended by Dr. Foad and Dr. Frederick for his work-related injury to his right shoulder.

Signed and filed this 10th day of January, 2019.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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